Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

REPLY COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

I. INTRODUCTION AND BACKGROUND

On December 20, 2001, the Federal Communications Commission (FCC) released a notice of proposed rulemaking (NPRM) in the above-captioned proceedings. The FCC's NPRM initiates its first triennial review of the policies for the incumbent local exchange carriers' (ILECs') provision of unbundled network elements (UNEs) to competitive local exchange carriers (CLECs). The FCC invited comments regarding under which circumstances the ILECs must make parts of their networks available to CLECs consistent

with section 251 of the Telecommunications Act of 1996 (1996 Act). The FCC also invited comments regarding the UNE platform (UNE-P) and the provision of UNE combinations. The Public Utilities Commission of Ohio (Ohio commission) filed initial comments in April and hereby submits reply comments.

Typically, the Public Utilities Commission of Ohio (Ohio commission) is not able to dedicate additional resources to formulating reply comments in FCC proceedings and it generally relies on its initial comments to reflect its position in important proceedings. Due to the issuance of a significant Federal court decision after the initial comments were filed in this docket, however, the Ohio commission is taking this opportunity to file brief reply comments primarily to address the D.C. Circuit Court of Appeals decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). As such, the scope of these reply comments is relatively narrow. But the Ohio commission stands behind all of the concepts described in its initial comments, even though some of those concepts are not specifically mentioned again in these reply comments.

The Ohio commission is aware that on July 8, 2002, the FCC filed a petition for rehearing before the D.C. Circuit relative to the *USTA* decision. The Ohio commission respects the FCC's right to legally challenge the *USTA* opinion. The Ohio commission does not necessarily agree with all aspects of the *USTA* decision; but the Ohio

commission also does not agree with all of the implications and criticisms of the *USTA* decision outlined by the FCC in its petition for rehearing. Given the timing of the rehearing process in that case and the comment cycle in this docket, commenters such as the Ohio commission currently must treat the *USTA* decision as the law of the land on this subject.

Accordingly, these reply comments must be viewed in that context. But even setting those legalities aside for the moment, the Ohio commission does believe that the FCC can discharge its statutory role in establishing UNEs and accomplish its policy objectives in a manner that passes muster under the *USTA* decision. In that vein, even if the FCC is not entirely pleased with the outcome of the pending rehearing process, it may choose to implement the *USTA* decision without further challenge in order to more expeditiously provide much-needed regulatory certainty and finality to issues that have been debated for more than six years now.

Previously in the UNE Remand proceeding, the Ohio commission indicated that FCC should adopt a default list of UNEs that would be modified or supplemented by State commissions pursuant to FCC guidelines. Uniquely among State commissions, the Ohio commission advocated that certain UNEs be removed from the default list, including unbundled local switching. The Ohio commission argued that exclusion of the switch was appropriate under the "necessary" and "impair" standards and that its

removal would promote facilities-based competition. Indeed, the FCC's *UNE Remand Order* partially eliminated unbundled switching for multi-line customers in the densest areas of the largest markets. This "non-universal" UNE approach to circuit switching was repeatedly cited with some approval by the *USTA* Court.

Consistent with that approach but also going further to refine it, the Ohio commission remains convinced that the FCC in this proceeding should generally establish a flexible list of UNEs to which State commissions would be able to include additional elements or eliminate elements based on FCC guidelines. Those guidelines should incorporate consideration of, among other things, the individual CLEC's operating location, individual CLEC business plans, class of customer served, and length of time a CLEC is in a particular market. Since State commissions are more familiar with the issues that should be considered regarding the ILECs' provision of UNEs, adding or subtracting UNEs from the FCC's default list should occur in State commission proceedings. In following *USTA*, it would be very difficult for the FCC to adopt a one-size-fits-all universal approach to the provision of ILEC UNEs to competing carriers. Instead, the FCC should more closely examine and consider adopting the model proposed by the Ohio commission.

II. DISCUSSION

A. Under the *USTA* decision, the Statutory Criteria for Determining UNEs Under the "Necessary" and "Impair" Standards Should Not be Applied on a Universal Basis Without Regard to Specific Markets and Customer Classes.

As outlined in our initial comments, the Ohio commission believes that all of the same primary and additional factors used in the *UNE Remand Order* are again referenced in the current NPRM, and the FCC seeks comment on whether to continue using them. NPRM at ¶¶ 7-9, 19, 21. The Ohio commission believes all of the factors listed in the original *UNE Remand Order* and again referenced in the current NPRM continue to be relevant. Thus, the Ohio commission maintains that it is appropriate for the FCC (in conjunction with State commissions) to utilize all of the major factors referenced in the NPRM. The remaining questions involve how the factors are evaluated and whether they are applied in the context of specific geographic markets and customers classes.

The Ohio commission respectfully submits that the *USTA* decision should cause the FCC to more closely examine recommendations like those offered by the Ohio commission in Section II.B. of its initial comments and further discussed below. Specifically, we suggested adopting a flexible list of UNEs that could be modified and applied by State commissions, consistent with FCC guidelines and conditions and

taking into account local market conditions. Prior to addressing those points, the relevant aspects of the *USTA* decision should be briefly reviewed.

The Court started its entire discussion of the UNE list by stating:

> As to almost every element, the Commission chose to adopt a uniform national rule, mandating the element's unbundling in every geographic market and customer class, *without regard to the state of competitive impairment in any particular market.* As a result, UNEs will be available to CLECs in many markets *where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have the object of Congress' concern*.

USTA, 290 F.3d at 422 (emphasis added).

The Court observed from this that it could not assess the legal support for a universal unbundling approach "because the [FCC] has loftily abstracted away all specific markets. . ." *Id.* at 423. As a related matter, the *USTA* decision criticized the FCC's order as lacking either a "comparable differentiation" applicable to UNEs other than circuit switching or a discussion of why that approach was inappropriate for UNEs other than circuit switching. *Id.* at 423. *See also Id.* at 426 (Court characterized unbundling findings as being "detached from any specific markets or market categories").

Thus, in formulating a defensible method for determining UNEs under the *USTA* decision, the FCC needs to craft a methodology that incorporates (or at least allows for) the consideration of specific geographic markets and customer classes. Because there

would appear to be no practical way for the FCC itself to apply such a UNE methodology to customer classes and geographic markets across the nation, it needs to rely on State commissions to help make those specific findings and determinations. Such an approach would be similar to the TELRIC pricing methodology for UNEs recently affirmed by the United State Supreme Court.

B. State Commissions Should Have a Crucial Role in Applying Local Market Conditions to the Default Federal List of UNEs.

The NPRM sought comment on the role of State commissions concerning implementation of the unbundling requirements. As a threshold matter, the FCC reinforced its prior conclusions that State commissions have the authority to add new UNEs to the default FCC list of UNEs. NPRM at ¶ 75. The FCC also recognized that administering the applicable statutory and regulatory standards would be increasingly burdensome, while acknowledging that State commissions "may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdiction, and that entry strategies may be more sophisticated in recognizing regional differences." *Id.* Thus, the NPRM asks for comment on the extent to which State commissions should act in creating, removing and implementing unbundling requirements. *Id.* The FCC invited State commissions, in particular, to comment on these issues. NPRM at ¶ 76.

In its initial comments, the Ohio commission endorsed an approach whereby the FCC would establish a *flexible* default set of UNEs that could, subject to certain guidelines and conditions, be modified by a State commission on a prospective basis. At that time, the Ohio commission noted that the practical problem is how the FCC can possibly apply these factors on a prospective basis, given that each of the issues are fact-intensive and can change over time. Moreover, the Ohio commission maintained that the underlying issues regarding specific market conditions are uniquely local in nature.

In light of the *USTA* decision, Ohio's proposed model becomes even more compelling. The FCC can establish guidelines that, when applied by State commissions, take into account local market conditions and/or customer classes in order to determine whether particular UNEs meet the "necessary" and "impair" standards. There is no feasible possibility that the FCC would be able to evaluate or apply such factors for each customers class or in all of the geographic markets throughout the country.

In the FCC's petition for rehearing filed in the *USTA* case, it argued that its statutory authority to establish UNEs is analogous to its pricing authority under Section 252 and argued the D.C. Circuit should follow the Supreme Court's lead in affirming TELRIC in the *Verizon* case. FCC Petition at 8-10. The Ohio commission agrees that the FCC's UNE authority is analogous to its pricing authority. Indeed, the Ohio commission already argued this analogy in its initial comments. Ohio Commission

comments at 8. And the TELRIC model upheld by the Supreme Court is very analogous and complimentary to the model being advocated by the Ohio commission here. TELRIC is detailed enough to ensure that both the statutory pricing requirements and the FCC's specific policy initiatives are met; yet, it also gives State commissions substantial discretion and latitude to ensure that fair and reasonable results are reached in particular cases, consistent with the statutory framework.

There is no one-size-fits-all answer to a reasonable TELRIC rates; rather, the same pricing methodology is used by State commissions throughout the country to establish company-specific rates for UNEs and interconnection. In the same way that the FCC's TELRIC methodology is applied by State commissions through incorporating specific facts and data from the record, the flexible UNE list and FCC guidelines should be applied by State commissions to ensure that, where appropriate, the outcome in specific cases may vary from the default UNE list based on the unique facts and circumstances presented.

The Ohio commission will not reiterate all of the defining features of its recommendation, which is already outlined in detail in our initial comments. But suffice it say that on a prospective basis, the dynamic technological, competitive and economic factors for determining whether competitors' provision of local telephone service would be impaired without a certain UNE are not generally amenable to a

singular, conclusive nationwide determination by the FCC. They are largely fact-intensive or specific to a particular geographic region or market. These same arguments made by the Ohio commission previously have now been confirmed by the *USTA* Court. State commissions are well-suited to make determinations based on local market conditions and to make adjudicative findings on fact based on a contested hearing process.

This approach is consistent with Congress' design. In crafting Section 252 to outline the role to be played in formulating interconnection agreements and implementing the substantive duties of ILECs contained in Section 251, Congress refers *forty-five* times to the "State Commission," with four such references contained in the subsection headings. *See* 47 U.S.C.§ 252 (2002). And reviewing the substantive provisions in that statute, it is evident that Congress envisioned a substantial role for State commissions in implementing the local competition provisions of the Act. In that context, the FCC should establish the flexible UNE list and delegate to States the ability to implement the FCC-established guidelines/factors for modifying the UNE list in a particular case. That would conform to the statutory framework, promote the FCC's goals and pass muster under the *USTA* decision.

I. CONCLUSION

The PUCO wishes to thank the FCC for the opportunity to file reply comments in this proceeding.

Respectfully submitted,

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Steven T. Nourse
Assistant Attorney General
Public Utilities Section
180 E. Broad St., 7th Floor
Columbus, OH 43215
(614) 466-4396
(614) 644-8764